UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

UNITED STATES OF AMERICA

09 Cr.976 (VM)

- v -

MARGARITA CANALES,

Defendant
---X

DEFENDANT'S OPPOSITION
TO THE GOVERNMENT RULE 404 (b)MOTION

Gregory S. Watts
Attorney for Defendant
Margarita Canales
26 Court Street, Suite 910
Brooklyn, New York 11242
(718) 875-5020

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The government seeks to offer certain evidence at trial pursuant to Rule 404(b) of the Federal Rules of Evidence. Specifically, the government contends the evidence offered will show Ms. Canales instructed postal employees to dump mail, non-waste mail, on prior occasion and similar to the conduct charged in the indictment.

The government seeks to offer this evidence though the testimony of Sheryl Frazier, Luz Rios, and Oly Osorio, employers of the Manhattanville Postal Station where Ms. Canales was employed. Sheryl Fraizer would allegedly testify that Ms. Canales instructed her to throw away non-waste mail on several occasions and that she overheard Ms. Canales giving similar instructions to other employees. Luz Rios allegedly received instructions from Ms. Canales to "get rid" of business mail accumulated at the station. Ms. Rios, however, was unable to process the mail, given Ms. Canales' instructions.

Finally, Oly Osorio will testify that Ms. Canales had her to get rid and hide mail.

I. ARGUMENT

Evidence of prior other crimes, "wrongs or acts", may be admissible under Federal Rules of Evidence 404(b) to show "intent,.......knowledge, identity, or absent of mistake or accident" but not to show character or propensity.

When reviewing the admission of evidence pursuant to Rule 404(b), the court must consider whether the (1) prior crime evidence was "offered for a proper purpose"; (2) the evidence is relevant to a disputed issue; (3) the probative value of the evidence was substantially outweighed by its potential for unfair prejudice pursuant to Rule 403; and (4) the court administered an appropriate limiting instruction. Huddleston v. United States, 485 U.S. 681, 691-92 (1988).

This circuit has taken an indusionary approach to the admission of prior crime evidence under which such evidence "is admissible for purposes other than to show the defendant's criminal propensity" United States v. Paulino, 445 F.3d 211, 221.(2d. Cir.2006).

This indusionary approach, however, is not an invitation to the government to offer "carte blanche", any prior acts of the defendant in the same category of crime, United States v. Garcia, 291 F.3d 127, 137 (2d Cir. 2002).

Where the evidence is offered for the purpose of establishing the defendant's knowledge or intent, the court requires the government to "identify a similarity or connection between the two acts that make the prior act relevant to establishing knowledge of the current Act. Id.at 137.

The government must also show “similarity” or some connection” of prior acts of evidence to the charged crime in order to establish that the prior act is relevant to a disputed, element, such as intent. United States v. LaFlam, 369 F.3d 153 (2d Cir. 2004).

In the case at bar, the proffer evidence lacks specifity in dates, location and time of occurrence in order for this court to make a determination as to its relevancy. The proffered evidence does not specify when in relation to the charged crime that Ms. Canales told Sheryl Fraizer to throw away non-waste mail. There is nothing in the proposed testimony that Ms. Fraizer complied with Ms. Canales’ request or reported the alleged crime to the postal inspector. Additionally, the two other employees whom Ms. Fraizer overheard Ms. Canales giving instructions are not identified by the government.

Similar details are also lacking in Oly Osorio proffer testimony. There is no dates or times Ms. Osorio received these instructions prior to the charged crimes. The defense cannot adequately prepare and defend the proffer evidence without knowing the dates and time of occurrence. For example Ms. Canales may not have worked at her station or was on detail, other assignment when the statements were made. This is the difficulty the defense has in preparing an argument to the government proffer.

Luz Rios proffered testimony is also just as vague. In the Ms. Canales told her to “get rid” of the business mail that was accumulated. There are no dates or times when these instructions were given. Nor is the instructions, if accurate, reflect some sinister act by the defendant. Ms. Rios statement is subject to different interpretations. Ms. Canales may have simply instructed an employee under her supervision to complete her assignment, process the mail, “get rid” of the business mail. Certainly Ms. Rios from the government submission does not state Ms. Canales told her to dump it, put it in the dumpster, hide it, or don’t process it”. Rios, from the government proffer, simply concludes she could not finish the work assigned to her within the time required to do so.

The proffer evidence tends to show propensity, if accepted as fact, rather than to sow Ms. Canales’ state of mind. Secondly, there is no similarly between the charged crime and the proffered evidence. Ms. Canales is charged with dumping non-waste mail. The proffered evidence suggest Ms. Canales, allegedly told fellow employees to hide, or “get rid of mail” or throw it away. None of the testimony establish she directed the employees to dump the mail in the dumpster as charged in the indictment.

Since there is no similarity to the proffered evidence and the charged crimes, this court must deny the government’s request to offer the proffer evidence to establish the defendant’s state of mind on the issue of knowledge and intent.

Secondly, the proffered evidence should not be admitted to show the absence of mistake or accident on the part of Ms. Canales and others.

Ms. Canales, in her statement, to the postal inspector stated non-waste mail was placed in and around the dumpster by her. She did not place deliverable mail or non-waste mail in the dumpster nor did she instruct any employees to do the same. If non-waste mail was placed in the dumpser on April 2, 2009, it was without Ms. Canales knowledge or other employees knowledge. Thus, if a mistake was made in the dumping of the mail, it occurred unbeknown to the parties. There will be no proof in this trial that anyone saw Ms. Canales dump mail on a prior occasion. Thus, the issue of mistake does exist as a possible defense.

The government can complete the narrative as to what occurred on April 2, 2009, without including the prior act of testimony. The government appears to be offering “carte blanche” any prior act of Ms. Canales in the same category of crime.

There is nothing unique, distinct about placing mail in a dumpster that would require the government to prove the modus operandi in this case. There is no signature to any of these acts which would identify the hard work of Ms. Canales. There will be no evidence that she dumped non-deliverable mail on prior occasions. That if she did it was so unique and unusual that one could conclude it was her doing exclusively.

Most, if not all, of the evidence will unduly prejudice Ms. Canales if admitted in the government's case-in-chief. A jury may conclude that Ms. Canales was acting in conformity with a propensity to the stated charge. Any limiting instruction under Rule 403 would not insulate Ms. Canales from the perception of the jury that she is guilty from the inception if the proffer evidence is admitted.

II. CONCLUSION

Based upon the foregoing, the defendant request the government's motion be denied in its entirety in that the probative value of the proffer evidence is outweighed by its extreme prejudicial effect.

Dated: Kings County
June 3, 2010

Yours, etc.

Gregory S. Watts
Attorney for the Plaintiff
26 Court Street, Suite 910
Brooklyn, New York 11242
(718) 875-5020